STAY EXHIBIT 1

Appeal of the NFL Parties of the Special Master's Ruling
Regarding the Use of the Appeals Advisory Panel on Claim Appeals

The National Football League and NFL Properties LLC (the "NFL Parties") respectfully appeal, in part, the Special Master's September 28, 2018 decision regarding the use of the Appeals Advisory Panel on Claim Appeals (the "Special Master AAP Ruling"). The NFL Parties submit that the Special Master's failure to consult with the neutral Appeals Advisory Panel ("AAP") Members and Consultants ("AAPs" and "AAPCs")—as well as the Special Master's failure to reconsider certain appeal determinations with the assistance of AAPs and AAPCs in response to the NFL Parties' submissions—constitutes an abuse of discretion with respect to 17[1] claim appeals turning on technical medical issues where the Qualifying Diagnoses were rendered by Qualified MAF Physicians ("MAF Physicians")[2] later terminated from the program and/or severely criticized by AAPs for suspect methodologies and flawed diagnoses. The NFL Parties respectfully seek reconsideration of these 17 claim appeals, prior to payment, with the assistance of AAPs and AAPCs.

PRELIMINARY STATEMENT

The NFL Parties are committed to paying Monetary Awards for all Qualifying Diagnoses rendered pursuant to the diagnostic criteria set forth in the Settlement Agreement. While the Settlement Agreement grants the NFL Parties the right to appeal any Monetary Award, the NFL Parties do not do so lightly. In fact, after consultation with their expert medical advisors, the NFL Parties have appealed only 15% of all

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[1] Specifically, the NFL Parties appeal with respect to the claims of SPIDs 100000070, 100002497, 100002712, 100003221, 100004486, 100004715, 100004758, 100005721, 100006765, 100008030, 100008258, 100009422, 100013190, 100016955, 250002398, 950000043, and 950003710.

[2] For ease of reference, the NFL Parties shall refer to "MAF Physicians" when discussing neurologists approved to serve in the Settlement Program as diagnosing physicians either in their role as a Qualified MAF Physician or alternatively as a Qualified BAP Provider.

Monetary Awards approved to date by the Claims Administrator, and only in cases where there was clear and convincing evidence that the diagnosing physician erred by rendering a diagnosis that did not meet the diagnostic criteria negotiated by the Parties and approved by the Court.[3]

This is the issue: The Settlement Agreement provides this Court (and the Special Masters) with discretion to consult with AAPs and AAPCs in connection with appeals of claim determinations; however, given the technical medical issues involved, the NFL Parties are concerned that, on information and belief, the Special Master has failed to consult with an AAP or AAPC on *36 of 37 adjudicated appeals* the NFL Parties have brought with respect to Qualifying Diagnoses rendered by MAF Physicians.

MAF Physicians are hardly infallible. Indeed, several MAF Physicians who have provided a disproportionate number of Qualifying Diagnoses have since been terminated from the program by the Claims Administrator and/or harshly criticized by AAPs for questionable methodologies and incorrect diagnoses. The 17 claim appeals at issue here involve diagnoses by four such suspect MAF Physicians—Dr. Randolph Evans (criticized by AAPs and then terminated), Dr. Nicholas Suite (criticized by AAPs and then terminated) and partners Drs. Bruce Rubin and Kester Nedd (criticized by AAPs). Most of these appeals raise precisely the same technical diagnostic issues for which these MAF Physicians have been sharply criticized by the AAPs. Even though the Special Master has been made aware of the significant issues and criticisms regarding these MAF Physicians, the Special Master nevertheless failed to consult with an AAP or AAPC on any of these 17 appeals and rejected the NFL Parties' request that he reconsider these

[3] Specifically, out of 657 Monetary Awards approved by the Claim Administrators to date, the NFL Parties have appealed only 102.

appeals with their assistance. The NFL Parties submit that this constitutes a clear abuse of discretion.

For these reasons, and those set forth below, the NFL Parties respectfully request that, prior to payment, the Court order the reconsideration of these 17 claim appeals in consultation with an AAP and, where applicable, an AAPC.

FACTUAL BACKGROUND

A. The Role of the AAP Under the Settlement Agreement

The Settlement Agreement provides that, with respect to appeals by the Parties, the Court "may be assisted, in its discretion, by any member of the Appeals Advisory Panel and/or an Appeals Advisory Panel Consultant." (Settlement Agreement, § 9.8.) While the decision to seek such assistance is discretionary, the Parties to the Settlement Agreement made the AAPs and AAPCs a central part of the claim appeal process because they recognized that the Court or its designees (here, the Special Masters) would not be medical experts or have the medical training necessary to evaluate medical records and other technical medical issues. The AAP was created to advise the Court (and, by extension, the Special Masters) on issues requiring inherently technical medical expertise—as in any case where the Court retains experts to advise on technical issues. (*See id.*, § 2.1(g) (members of the Appeals Advisory Panel are "eligible to advise the Court or the Special Master with respect to medical aspects of the Class Action Settlement").) As the name of the Appeals Advisory Panel suggests, the goal in providing the Court and the Special Masters with such assistance was to ensure that appeals are correctly decided as a matter of medicine and to ensure that the Court and

Special Masters are not put in the position of having to evaluate diagnoses made by medical professionals without the benefit of proper medical expertise.[4]

The Parties selected the elite group of eight AAPs and three AAPCs based on their unquestionable expertise and stature in their respective fields and after conducting a stringent vetting process that included interviews. The eight AAPs are highly-skilled, leading neurologists who are incontestably qualified to evaluate the medical records and other materials submitted in Claim Packages and help the Special Master and Court determine on appeal whether a diagnosing physician properly rendered a Qualifying Diagnosis under the Settlement's negotiated and agreed-to diagnostic criteria (as opposed to what the diagnosing physician might otherwise believe merits compensation). Similarly, the AAPCs are leading neuropsychologists in the field who, like the AAPs, have unquestionable expertise in evaluating the neuropsychological testing results submitted in Claim Packages. The AAPs and AAPCs have the benefit of regular roundtable calls with each other and the Claims Administrator concerning the diagnostic questions central to the Settlement Program and, as a result of their role (including their mandatory review, to date, of hundreds of pre-Effective Date claims for the Claims Administrator), they have evaluated the work of dozens of diagnosing physicians across the spectrum of claims. The AAPs and AAPCs are true neutrals, with no ongoing contact with lawyers for claimants, Co-Lead Class Counsel or the NFL Parties.

[4] In addition to discretionary use of AAPs and AAPCs in the context of appeals, the Settlement Agreement identifies certain categories of claims where review by AAPs is compulsory—for example, in connection with the initial determination by the Claims Administrator of pre-Effective Date claims. (*See id*., § 6.4.)

B. The Qualified MAF Physicians

Although the Parties also approve each MAF Physician who participates in the Settlement Program, the vetting process bears no comparison to that used for the AAP. The Parties were (and remain) under significant pressure to provide immediate and adequate coverage of MAF Physicians across the country in order to implement the Settlement Program efficiently. To that end, the Parties have approved 235 MAF Physicians based on a limited review of the physicians' applications and resumes and without the benefit of interviews; to date, 140 of these physicians have signed contracts to participate in the Settlement Program. In terms of training, the Claims Administrator provides each contracted MAF Physician with a manual explaining the role and the Settlement's diagnostic criteria and has provided periodic alerts on various topics.[5]

The unquestionable across-the-board excellence of the elite group of AAPs and AAPCs contrasts with the widely varying quality of the MAF Physicians. Indeed, the Settlement Program's short history demonstrates that MAF Physicians are far from unerring, and the NFL Parties' appeal right—and the availability of the AAPs and AAPCs in connection with those appeals—is a necessary check on the payment of otherwise invalid claims. This motion concerns appeals of claims based on diagnoses of four MAF Physicians—Drs. Randolph Evans, Nicholas Suite, Bruce Rubin and Kester Nedd—as to whom the AAPs (in connection with audit work) have provided feedback to the Claims Administrator that these doctors repeatedly have committed material diagnostic errors in the sample of claims the AAP have reviewed, raising serious doubts that claims based on these MAF Physicians' diagnoses are valid under the Injury

[5] While the NFL Parties have no ongoing contact with MAF Physicians, that is not the case with lawyers for claimants. On information and belief, certain claimants' counsel have gone so far as to draft affidavits and letters for MAF Physicians to sign in connection with claim filings and appeals.

Definitions set forth in the Settlement Agreement. Indeed, these diagnostic errors and suspect methodologies, among other things, have led the Claims Administrator to disqualify Drs. Evans and Suite from the Settlement Program.[6]

Dr. Suite. Dr. Suite provided diagnoses to 26 retired players, approximately 77% of whom traveled out of state to see him, eight of which related claims remain in audit pending the outcome of various ongoing investigations.[7] In connection with a previous audit investigation into Dr. Suite himself, the Claims Administrator asked an AAP to review six claims supported by Dr. Suite's diagnoses.[8] While not finding evidence of fraud, the AAP concluded that "the CDR scores [Dr. Suite] assigned did not always match the player's reported functional abilities."[9] Based on this feedback, the Claims Administrator expressed that he was "concerned about those potential flaws in Dr. Suite's MAF diagnoses," but reasoned that these concerns were "ones of clinical judgment and compliance with medical and Settlement Agreement diagnostic criteria . . . to be dealt with in the claims process," rather than the audit process.[10] In other words, the Claims Administrator stated that the appeals process was the proper vehicle to rectify the diagnostic errors observed by the AAP. Ultimately, the Claims Administrator terminated

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6 We understand that, given the ongoing concerns about the diagnostic work of numerous MAF Physicians, the Special Masters and Claims Administrator are discussing ways that the Claims Administrator, with the assistance of the AAPs and AAPCs, might provide more quality control and oversight of the diagnostic work of the MAF Physicians and better educate them on the Settlement Agreement's Injury Definitions.

7 Dr. Suite also provided Diagnosing Physician Certification Forms for 38 retired players for whom he reviewed medical records but did not personally examine, which the Claims Administrator disallowed as contrary to the requirements of the Settlement Program.

8 The Claims Administrator did not tell the Parties which particular claims were reviewed by an AAP.

9 The National Alzheimer's Coordinating Center's Clinical Dementia Rating ("CDR") scale is used to measure functional impairment in the areas of Community Affairs, Home & Hobbies, and Personal Care, and is an evaluative component set forth in the Settlement Agreement's Injury Definitions for Level 1.5 and 2 Neurocognitive Impairment. (*See* Settlement Agreement, Ex. 1 at 2-3.)

10 Mar. 29, 2018 email from Orran Brown to Parties, attached as Ex. 1 (redacted).

Dr. Suite from continued participation as a Qualified MAF Physician in the Settlement Program.

The NFL Parties have appealed six claims based on Dr. Suite's diagnoses—including on the very issue of his assignment of CDR scores that do not match the player's reported functional impairment. The Special Master recently denied the NFL Parties' appeals on two of these claims (SPIDs 100002712 and 100016955) without consulting an AAP; another three appeals remain pending with the Special Master. The NFL Parties seek reconsideration of these two recently denied appeals with the assistance of an AAP, and submit that, in view of the red flags raised by the AAP to the Claims Administrator with respect to Dr. Suite, it would be an abuse of discretion for the Special Master not to avail himself of the assistance of an AAP in connection with the three remaining appeals (as well as any further appeals raising technical medical issues) arising from Dr. Suite's diagnoses.

Drs. Rubin and Nedd. Drs. Rubin and Nedd have provided diagnoses to 29 retired players, approximately 45% of whom traveled out of state to see them, eight of which related claims remain in audit pending the outcome of various ongoing investigations. In connection with a previous audit of Drs. Rubin and Nedd, the Claims Administrator sent four claims supported by these MAF Physicians' diagnoses (two by each physician) to an AAP for review.[11] According to the Claims Administrator, the AAP concluded "that in three of the claims, the players likely misrepresented their cognitive impairments and the AAP member would deny the claims," and on the fourth claim the AAP would downgrade the diagnosis from Level 2 to Level 1.5. In addition, the AAP found that Drs. Rubin and Nedd "did not adequately apply CDR methods or

[11] The Claims Administrator did not tell the Parties which particular claims were reviewed by an AAP.

scoring algorithms to properly assign Injury Definition diagnoses," were "overly reliant on self-report," and "did not document critical evaluation of the validity or accuracy of neuropsychological reporting of cognition and function."[12] Again, however, in the absence of any finding of fraud, the Claims Administrator let the claims proceed so that these diagnostic issues could be addressed on appeal.

The NFL Parties have appealed eight claims involving diagnoses by Drs. Rubin and Nedd, and the Special Master recently has decided five of them without consulting with an AAP or AAPC (SPIDs 100004715, 100008030, 100008258, 100013190, and 950003710), while one appeal remains pending before the Special Master and two other appealed claims are now in audit. The NFL Parties seek reconsideration of the decided appeals with the assistance of an AAP—which appeals raise precisely the same questions of CDR scoring and performance validity testing faulted by the AAP—and respectfully submit that, in view of the red flags identified by the AAP to the Claims Administrator with respect to Drs. Rubin and Nedd, it would be an abuse of discretion for the Special Master not to avail himself of the assistance of an AAP in connection with the remaining pending appeal (as well as any further appeals raising technical medical issues) arising from Dr. Rubin's or Dr. Nedd's diagnoses.

Dr. Evans. Dr. Evans is in a league of his own. He has rendered 114 Qualifying Diagnoses (94 in the MAF) and is singularly responsible for 30% of all Qualifying Diagnoses rendered by the 140 MAF Physicians—a staggering percentage. Over 50% of the retired players diagnosed by Dr. Evans traveled out-of-state to see him (as opposed to seeing MAF Physicians located much closer to them geographically—an immediate red flag), and 67 claims supported by Dr. Evans' diagnoses remain in audit pending further

[12] June 29, 2018 Notice of Conclusion of Audit, attached as Ex. 2 (redacted).

investigation. In fact, the Claims Administrator informed the Parties on several occasions that, based on audit work performed in consultation with the AAP, the Claims Administrator had significant concern that Dr. Evans had regularly misapplied the CDR in a manner that allowed him to render Qualifying Diagnoses that otherwise would not be supported.[13] Ultimately, the Claims Administrator terminated Dr. Evans from the Settlement Program based on "his questionable methodologies, disregard of Program rules and refusal to cooperate or even discuss things with [the Claims Administrator]."[14]

Since his termination, Dr. Evans has made clear his emphatic disagreement with the Settlement Agreement's diagnostic criteria, including its use of the CDR instrument. (*See* D. Hurley, *For Your Patients-Concussion: Why Some Neurologists Are Calling 'Foul' Over Criteria for NFL Concussion Settlement*, Neurology Today, Oct. 4, 2018 (protesting the Settlement Agreement's diagnostic criteria, including its use of the CDR in evaluating functional impairment).) But Dr. Evans' disagreement with the bargained-for diagnostic standards set forth in the Settlement Agreement does not excuse his failure to follow them.

Of the 17 appeals at issue here, ten involve diagnoses by Dr. Evans where the Special Master did not consult an AAP or AAPC.[15] The NFL Parties seek reconsideration of these 10 appeals—most of which raise precisely the same questions of CDR scoring faulted by the AAP—with the assistance of an AAP/AAPC and respectfully submit that, in view of the red flags identified by the AAP to the Claims Administrator,

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[13] The Claims Administrator did not tell the Parties which particular claims were reviewed by an AAP.

[14] *See* Oct. 17, 2018 email from Orran Brown to Parties, attached as Ex. 3 (redacted).

[15] SPIDs 100000070, 100002497, 100003221, 100004486, 100004758, 100005721, 100006765, 100009422, 250002398, and 950000043. The NFL Parties have brought nineteen additional claim appeals involving Dr. Evans' diagnoses but sixteen of those claims are now in audit and one is pending before the Special Master. These additional appeals should be reviewed by an AAP at the appropriate time.

as well as the disproportionate volume of Qualifying Diagnoses and out-of-state travel by retired players, it would be an abuse of discretion for the Special Master not to avail himself of the assistance of an AAP in connection with the remaining appeals (as well as any further appeals raising technical medical issues based on Dr. Evans' diagnoses).

C. AAP Reasoning in Claim Denials for pre-Effective Date Claims Confirms the Merit of the NFL Parties' Appeals and the Need for AAP Consultation on Appeal

Not only do the general criticisms already levied by the AAPs with respect to these MAF Physicians' methodologies and diagnoses raise red flags, but existing AAP decisions denying pre-Effective Date claims confirm the merit of the NFL Parties' appeals and underscore the need for AAP/AAPC consultation on these appeals.

As noted above, a consistent diagnostic error identified by AAPs when they reviewed a subset of claims supported by diagnoses of Drs. Suite, Rubin, Nedd and Evans (at the Claims Administrator's request and in connection with various audits) was that these MAF Physicians misapplied the CDR, such that the CDR score applied was wholly inconsistent with the functional abilities of the former player. AAPs have denied pre-Effective Date claims (AAP review is compulsory on the initial claim determination of such claims) for the very same misapplication of the CDR that the NFL Parties have raised in these appeals. For example, a CDR score of 2.0 in Community Affairs (which might support a Qualifying Diagnosis of Level 2 Neurocognitive Impairment) requires that a person have "no pretense of independent function outside home." (*See* CDR Worksheet, attached as Ex. 4.) Thus, AAPs have rejected diagnosing physicians' CDR scores of 2.0 in Community Affairs where a retired player had "the ability to drive independently" and "perform volunteer duties for church" or "volunteer[] as a coach for a High School football team" (*see* Doc. Nos. 159462, 172128), and where a retired player

"manages his finances, lives alone, drives, and has a 'rental business" (*see* Doc. No. 172329).

But precisely the same diagnostic errors are present in the claim appeals at issue here, which did *not* undergo AAP review in connection with the initial claim determination (because they are MAF Physician claims) or on appeal (because the Special Master failed to consult an AAP). For example, Dr. Evans assigned a CDR score of 2.0 to SPID 100002497 (a retired player in his early 40s seeking $3 million for Level 2 Neurocognitive Impairment), even though the retired player denied any difficulty with driving and was CEO of an athletic training company employing twelve staff members. In addition, social media posts brought to the Special Masters attention on appeal demonstrate that this retired player continues to ski, cook, and host golf tournaments and NFL viewing parties for fans. Dr. Evans' conclusion that this player merited a CDR score of 2.0 in Community Affairs (reflecting "no pretense of independent function outside home") is squarely inconsistent with the repeated rulings of the AAP, and providing a $3 million Monetary Award for Level 2 Neurocognitive Impairment to a player with this level of functional ability makes a mockery of the Settlement Program. Of the 17 claim appeals at issue here, the NFL Parties appealed 13, at least in part, based on clearly erroneous CDR scoring of this ilk.[16]

In addition, in connection with prior reviews of pre-Effective Date claims, AAPs/AAPCs have provided guidance on when claims should be denied because the performance validity metrics in the neuropsychological testing reflects malingering and

[16] By way of further examples, Dr. Evans assigned a CDR score of 2.0 in Community Affairs to SPID 100004486 despite the retired player being employed as a medical recruiter, continuing to drive and serving as the president of a non-profit (*see* Doc. No. 169561), while Dr. Suite assigned the same CDR score of 2.0 to SPID 100016955 who had recently incorporated multiple businesses, attended and spoke at football games and events, and volunteered to renovate a local shelter (*see* Doc. No. 169082).

invalidates a diagnosis. For example, an AAP (in consultation with an AAPC) denied a claim for Level 1.5 Neurocognitive Impairment "due to . . . detection of sub-optimal effort or malingering on multiple performance validity tests." (*See* Doc. No. 167687.) Similarly, an AAP denied a claim for Level 1.5 Neurocognitive Impairment "because of extremely low scores on two validity measures suggesting suboptimal effort and invalid performance, and insufficient explanation [was] provided for discrepancies and inconsistencies in the test scores." (*See* Doc. No. 166325.) The AAP who reviewed a subset of claims supported by Drs. Rubin's and Nedd's diagnoses specifically faulted the doctors with respect to their evaluation of performance validity and determined that, in three of the four cases reviewed, "the players likely misrepresented their cognitive impairments and the AAP member would deny the claims."[17] Among the appeals at issue here is an appeal of Dr. Rubin's Qualifying Diagnosis of Level 1.5 Neurocognitive Impairment despite the fact that the retired player failed four of seven performance validity metrics in a manner that clearly demonstrated malingering (SPID 950003710). This type of appeal requires the expertise of the AAPs and, particularly, the AAPCs, who are familiar with the intricate issues involved in performance validity testing. (*See also* NFL Parties' appeals regarding SPIDs 100000070, 100002497, and 100013190 (raising performance validity issues).)

These examples illustrate the critical importance of AAP and AAPC review of medical records when an appeal turns on medical arguments that highly-trained neurologists and neuropsychologists can assist the Special Master to interpret properly. The expectation was that the Court (or the Special Master) would exercise its discretion to use this resource when appeals involve technical medical issues beyond the Court's or

[17] June 29, 2018 Notice of Conclusion of Audit, attached as Ex. 2 (redacted).

Special Master's expertise, especially where, as here, the AAP has specifically called into question the diagnostic work performed by the doctors whose diagnoses are at issue.

D. The Special Master's Pattern and Practice of Not Consulting the AAPs/AAPCs

The Special Master has denied 36 out of 37 of the NFL Parties' adjudicated appeals of claims based on Qualifying Diagnoses rendered by MAF Physicians; on information and belief, the Special Master only consulted an AAP or AAPC on the lone NFL appeal he granted. Concerned about this lack of consultation, the NFL Parties wrote several letters to the Special Master urging a re-review of recent appeal determinations with the assistance of the AAPs and AAPCs where the NFL Parties' appeal turned on technical medical issues and the Monetary Award had not yet been paid.[18]

In those letters, the NFL Parties pointed out that AAP determinations in connection with pre-Effective Date appeals—particularly concerning CDR scoring and performance on cognitive screening and performance validity tests—clearly establish the merits of the NFL Parties' appeals and the invalidity of the diagnoses, and underscored the need for the Special Master to consult with the AAPs/AAPCs on such appeals. (*See, e.g.*, Ex. 5 at 3-5.) The NFL Parties also highlighted to the Special Master that the vast majority of the recent appeal denials involved diagnoses by MAF Physicians whose diagnostic practices had been sharply criticized by the AAP in connection with their audit work. The NFL Parties detailed the criticisms raised by the AAPs with respect to Drs. Suite, Rubin, Nedd and Evans, and explained how the NFL Parties' appeals of claims based on these doctors' diagnoses, and denials by the Special Master without consultation

[18] *See* June 28, 2018 Letter from Bruce Birenboim to Special Master Wendell Pritchett (Ex. 5); July 11, 2018 Letter from Bruce Birenboim to Special Master Wendell Pritchett (Ex. 6); and Aug. 28, 2018 Letter from Bruce Birenboim to Special Master Wendell Pritchett (Ex. 7) (redacted).

with the AAP/AAPC, had raised precisely the same diagnostic issues on which AAP members had previously found these doctors to be in error. (*See* Ex. 7 at 2-4.)

E. The Special Master AAP Ruling

The Special Master AAP Ruling denied the NFL Parties' request for a re-review, with AAP/AAPC assistance, of recent NFL Parties' appeals that turned on technical, medical issues. The Special Master held that "compulsory AAP/AAPC review [of claims that turn on the sufficiency of medical evidence] is not required by the Settlement Agreement." (AAP Ruling at 1.) The Special Master stated that "compulsory review" of all such claims by AAPs and AAPCs would "burden Settlement Class Members with an additional requirement for approval of claims beyond the requirements set forth in the Settlement Agreement." (*Id*. at 2.) The Special Master concluded that "[t]he Settlement Agreement thus makes clear that the Court – and by extension, the Special Master – has the sole discretion to decide whether to consult an AAP/AAPC before ruling on an appeal." (*Id*. at 1.)

The Special Master did not rule, however, that he should never consult with AAPs and AAPCs in order to gain neutral medical insight when deciding appeals involving Qualifying Diagnoses made by MAF Physicians. Nor did the Special Master offer any views as to the circumstances in which such consultation would be necessary or otherwise appropriate. The Special Master also did not comment on any of the specific issues that formed the basis of the NFL Parties' request for a re-review of certain appeals in consultation with the AAPs and AAPCs, including the various diagnostic mistakes that AAPs had identified with respect to Drs. Suite, Rubin, Nedd and Evans or the AAP denials of pre-Effective Date claims based on virtually identical diagnostic errors as those identified by the NFL Parties as the basis for their appeals.

F. Standard of Review

The Special Master's decision not to consult the AAP/AAPC when deciding these claim appeals, or to re-review these claim appeals with the assistance of the AAP/AAPC, is a procedural matter reviewable for abuse of discretion. *See* Fed. R. Civ. P. 53(f)(5) ("Unless the appointing order establishes a different standard of review, the court may set aside a master's ruling on a procedural matter only for an abuse of discretion."); *see also* Settlement Agreement at § 9.8 (granting Special Master discretion to receive assistance from AAPs and/or AAPCs on claim appeals).

In reviewing for an abuse of discretion, the Court must determine, based on the totality of the circumstances, whether the Special Master's decision not to consult the AAP/AAPCs (either initially or on a re-review) exceeded the limits of the range of reasonable choices appropriate to resolving the matter at issue. *See Loinaz* v. *EG & G, Inc.*, 910 F.2d 1, 7 (1st Cir. 1990) ("There is no neat, standardized test for judging abuse of discretion; each case must be judged on its own facts and circumstances"); *Zervos* v. *Verizon New York, Inc.*, 252 F.3d 163, 169 n.5 (2d Cir. 2001) ("Discretion is said to be 'abused' ('exceeded' would be both a more felicitous and correct term) when the decision reached is not within the range of decision-making authority a reviewing court determines is acceptable for a given set of facts." (internal quotation omitted)); *U.S.* v. *Cunningham*, 694 F.3d 372, 383 (3d Cir. 2012) (district court's rulings are an abuse of discretion if "clearly unreasonable"); *Ferguson* v. *Eakle*, 492 F.2d 26, 29 (3d Cir. 1974) (considering "totality of [] circumstances" in determining that district court abused its discretion). The standard of review applicable to procedural decisions by a Special Master is less deferential than an appellate court's application of an abuse of discretion standard to a trial court's rulings. *See* Fed. R. Civ. P. 53, Special Committee Notes, 2003

Amendment Subdivision (g) ("The subordinate role of the master means that the trial court's review for abuse of discretion may be more searching than the review that an appellate court makes of a trial court.").

Regardless, this Court expressly retained "continuing and exclusive jurisdiction to interpret, implement, administer and enforce the Settlement Agreement" in accordance with its terms. (Am. Final Order and J. § 17, ECF No. 6534; *see also* Settlement Agreement § 20.1(n).) As such, this Court has the authority to consider and determine the appropriate procedural process for implementing the Settlement Agreement, including any guidelines for the proper discretionary use of the AAP/AAPC on appeals in order to reach an informed medical determination on claims.

ARGUMENT

I. The Special Master's Failure to Consult with the AAP/AAPC on 36 out of 37 Appeals Brought by the NFL Parties With Respect to MAF Physician Diagnoses Reflects an Abuse of Discretion

The goal in making the AAPs and AAPCs available to the Court (and, by extension, the Special Master) in connection with claim appeals was to provide a safeguard that the ultimate determinations would be correct—or at least not clearly wrong—as a matter of medicine. Where a MAF Physician has provided the Qualifying Diagnosis, the Claims Administrator (to date) has not consulted with an AAP/AAPC in connection with the initial claim determination. As a result, these initial claim determinations have been made without any assessment of the medical correctness or reliability of the diagnoses provided or their conformity with the criteria required by the Injury Definitions set forth in the Settlement Agreement. To date, the only possibility of neutral, medical input to evaluate the medical correctness and reliability of diagnoses by

MAF Physicians is if the Special Master exercises his discretion to consult with the AAP/AAPC on a claim appeal.

Of course, there is no question that MAF Physicians are not infallible, although that appears to be an assumption underlying the Special Master's failure to use the AAP/AAPC in connection with appeals of claims supported by MAF Physician diagnoses. Indeed, the history of the Settlement Program thus far indicates that certain MAF Physicians have, according to the AAPs, been using suspect methodologies and repeatedly rendering erroneous diagnoses. The AAPs reached these conclusions in the context of performing audit work at the request of the Claims Administrator, and the Claims Administrator determined that such medical errors should not be addressed in the audit process but instead in connection with the appeals process. However, where, as here, the Special Master has failed to consult with the AAP/AAPC in connection with *36 out of 37* of the NFL Parties' adjudicated appeals of claims based on diagnoses by MAF Physicians, it is not clear how these manifest medical errors by MAF Physicians will be addressed. Without the assistance of the AAP/AAPC in the context of appeals raising technical medical issues (beyond the purview of laypersons) arising from MAF Physicians' diagnoses, it is inevitable that Monetary Awards based on clearly erroneous diagnoses will continue to be paid. If so, the NFL Parties are not receiving the benefit of their bargain, which is particularly prejudicial after the NFL Parties agreed to uncap the Monetary Award Fund.

The NFL Parties have been judicious with respect to appealing claim awards and have done so with respect to only 15% of approved claims, and *only where leading expert medical consultants have concluded that the underlying diagnosis is clearly and*

convincingly wrong. Unsurprisingly, a large percentage of these appeals involve claims supported by diagnoses by the very same MAF Physicians who have been subject to serious criticism by the AAP (and, in certain cases, termination from the Settlement Program). But the material diagnostic errors by these MAF Physicians—already flagged by AAPs in connection with their audit work—have not been corrected on appeal.

The NFL Parties acknowledge that the Settlement Agreement provides the Special Master with discretion in choosing whether to consult with the AAP/AAPC on any particular claim appeal. However, the NFL Parties respectfully submit that the pattern and practice of the Special Master in failing to consult with the AAP/AAPC on *36 of 37 adjudicated claim appeals* brought by the NFL Parties, raising technical medical issues relating to diagnoses by MAF Physicians, on its face reflects an abuse of discretion and is simply not a reasonable choice under the circumstances.

II. The Special Master Abused His Discretion by Failing to Consult AAPs/AAPCs on Diagnoses by MAF Physicians Known to Have Used Suspect Methodologies and/or Made Material Diagnostic Errors

The NFL Parties, again, acknowledge that the Settlement Agreement provides the Special Master with discretion in choosing whether to consult with the AAP/AAPC on any particular claim appeal. However, the NFL Parties respectfully submit that there are categories of appeals where the failure to consult with an AAP/AAPC is not reasonable under the circumstances and thus constitutes an abuse of discretion. One such category is where the diagnosing MAF Physician is known to have been criticized by the AAP (and at times terminated from the Program) for suspect methodologies and erroneous diagnoses. That is the case with respect to each of the 17 NFL appeals at issue here.[19]

[19] At the very least, it would be unreasonable under the circumstance for the Special Master to fail to consult an AAP/AAPC where the NFL Parties' appeal raises precisely the same kind of medical error –

In fact, the Special Master's failure to consult with neutral AAPs and AAPCs has resulted in erroneous appeal determinations that are plainly inconsistent with the reasoning behind denial notices for pre-Effective Date claims that reflect the expert medical views of the AAP/AAPC on the very same diagnostic criteria at issue in these 17 appeals. Had the Special Master received the benefit of that medical expertise on these fundamental diagnostic issues, these erroneous decisions would have been easily avoided.

Moreover, the NFL Parties respectfully submit that there are particular technical medical issues as to which failure to consult with an AAP/AAPC is particularly misguided and unreasonable under the circumstances. For example, the question of whether the performance validity metrics in the neuropsychological tests reflect intentional malingering and a misrepresentation by the retired player of his cognitive abilities is a critical issue for the integrity of the Settlement Program, and it is also a highly technical issue that requires the specific expertise of the AAPC. Unassisted review by the Special Master, a layperson with no expertise in this highly technical area, simply provides no safeguard on appeal. Such questions, we submit, should presumptively have the benefit of AAP/AAPC expertise.

In addition, where a MAF Physician does not apply the specific battery of neuropsychological tests set out in the Settlement Agreement (the current BAP battery) but asserts that the substituted testing and accompanying diagnostic criteria are "generally consistent," the Special Master lacks the expertise to evaluate that assertion. As the AAPCs would explain, the question is highly qualitative, not quantitative. It would not be meaningful for the Special Master to count the number of tests substituted

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for example, CDR scoring or performance validity testing – previously found by the AAP with respect to that same MAF Physician. That would apply to at least 15 of the 17 appeals at issue here.

and deduce that the diagnosis is generally consistent because only 2 out of 5 tests were substituted. Rather, the Settlement Agreement identifies specific, widely accepted and validated tests, which are each meant to assess a very particular type of cognitive impairment in a given domain. The substituted tests may not measure the same types of impairment in a particular domain, or may not be as effective or valid as recognized in the medical community. Thus, the Special Master—by no fault of his own—is simply incapable of meaningfully evaluating whether the testing yields a diagnosis that is nonetheless "generally consistent" with the diagnostic criteria negotiated by the Parties and set forth in the Settlement Agreement for the BAP as meriting compensation.[20]

CONCLUSION

For the reasons set forth herein, the NFL Parties respectfully request that the Court reverse the Special Master AAP Ruling and order the Special Master's re-review of the 17 claim appeals identified herein in consultation with the AAP. In addition, the NFL Parties respectfully request that this Court exercise its explicit authority to give guidance on the implementation of the Settlement Agreement, including the proper discretionary use of the AAP/AAPC on appeals raising technical medical issues beyond the purview of a layperson.

[20] Finally, in separate briefing before the Court, the NFL Parties will be appealing a recent decision of the Special Master finding that, where the precise BAP battery of neuropsychological tests is given, but the diagnosing physician is acting in his MAF rather than BAP capacity, the MAF Physician is entitled to water down the BAP diagnostic criteria requirements and provide a Qualifying Diagnosis that would be unavailable under the BAP, so long as the MAF Physician asserts that the watered down outcome is nonetheless "generally consistent." As the NFL Parties will explain in appealing that separate decision, the Special Master's conclusion is wrong and would lead to highly inequitable results, since retired players with the wherewithal to pay for a MAF diagnosis (rather than taking the free BAP exam) will get the benefit of relaxed diagnostic criteria unavailable to any BAP participant. This result makes no sense. But, in the event this Court were to uphold the Special Master's ruling on this point, the NFL Parties submit that the Special Master would not be able to intelligently determine (without consulting with the AAP/AAPC) whether the test results—clearly *insufficient* under the BAP—are nonetheless "generally consistent" for purposes of a Qualifying Diagnosis.

Dated: October 29, 2018

Respectfully submitted,

PAUL, WEISS, RIFKIND,
WHARTON & GARRISON LLP

/s/ Brad S. Karp

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ATTORNEYS FOR THE NATIONAL FOOTBALL LEAGUE AND NFL PROPERTIES LLC

EXHIBIT 1

From: Orran Brown <OBrown@browngreer.com>
Sent: Thursday, March 29, 2018 1:26 PM
To: Anastasia Danias; Annie Pell; Birenboim, Bruce; cseeger@seegerweiss.com; dbuchanan@seegerweiss.com; Burns, Douglas; Bayard, Lynn B; mrosenberg@seegerweiss.com; Istel, Sarah; sgeorge@seegerweiss.com; Tarlowe, Richard
Cc: Bethany Anderson; Jessica Hacker Trivizas; jaw@garretsongroup.com; jbruemmer@garretsongroup.com; jpaschal@garretsongroup.com; mlg@garretsongroup.com; mfrancis@garretsongroup.com
Subject: Notice of Concluded Audit With No Report of Adverse Finding--Dr. Nicholas Suite

Pursuant to Audit Rule 14, we have concluded our audit investigation of Dr. Nicholas Suite, a board-certified neurologist in Davie, Florida, who is a Qualified MAF Physician. He is not a Qualified BAP Provider.

[redacted]

To obtain advice on the medical aspects of Dr. Suite's claims, we sent a sample of six of them to AAP member Dr. McMurtray on 2/22/18. Dr. McMurtray told us on 3/8/18 that Dr. Suite had provided some diagnoses

without the benefit of neuropsychological testing and that the CDR scores he assigned did not always match the player's reported functional abilities.

We are concerned about those potential flaws in Dr. Suite's MAF diagnoses. But these issues are ones of clinical judgment and compliance with medical and Settlement Agreement diagnostic criteria, rather than issues of misrepresentation, omission or concealment. We do not submit Reports of Adverse Findings in Audit under Audit Rule 15 for matters of potential misdiagnosis, rather than misrepresentation. Whether the players diagnosed by Dr. Suite qualify for Settlement benefits is to be dealt with in the claims process. He also presents an example of an MAF physician who needs better medical training or perhaps termination as a Qualified MAF Provider.

[redacted]

Orran

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EXHIBIT 2

MEMORANDUM

TO: **NFL Parties**
Co-Lead Class Counsel

CC: **Special Master Verrier**
Special Master Pritchett

FROM: **Orran L. Brown, Sr.**
Jessica Hacker Trivizas

DATE: **June 29, 2018**

RE: **Notice of Conclusion of Audit Without Adverse Audit Report: Drs. Bruce Rubin and Kester Nedd**

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

We sent two Rubin claims and two Nedd claims to the AAP to review. [redacted] The AAP member did not identify any issues of misrepresentation, omission or concealment from the doctors, but thought that in three of the claims, the players likely misrepresented their cognitive impairments and the AAP member would deny the claims. On the fourth claim, Dr. Rubin assigned a Level 2 diagnosis, but the AAP member would have approved it as a Level 1.5. Regarding the physicians' medical judgment, the AAP member found that the doctors:

> did not adequately apply CDR methods or scoring algorithms to properly assign Injury Definition diagnoses. They were overly reliant on self-report, did not document personally conducting structured CDR-type interviews, and did not document critical evaluation of the validity or accuracy of neuropsychological reporting of cognition and function. Although their formulations make notation of physical features like pain or sleep dysfunction, and mental health issues like depression and anxiety, I do not see documentation that these were appropriately or consistently considered as the cause of, or major contributors to, the claimants' impairments in CDR domains of Home & Hobbies, Community Affairs, and Personal Care.

[redacted]

III. CONCLUSION.

We have determined that there is not a reasonable basis to support a finding that Drs. Rubin or Nedd have misrepresented, omitted or concealed a material fact in connection with a claim. The AAP opinion includes issues of clinical judgment and compliance with the medical and Settlement Agreement diagnostic criteria, rather than issues of misrepresentation, omission or concealment.

[redacted]

[redacted]

[redacted]

[redacted]

EXHIBIT 3

From: Orran Brown <OBrown@browngreer.com>
Sent: Wednesday, October 17, 2018 12:26 PM
To: Anastasia Danias; Annie Pell; Birenboim, Bruce; cseeger@seegerweiss.com; Hammerman, Claudia; dbuchanan@seegerweiss.com; Burns, Douglas; Bayard, Lynn B; mrosenberg@seegerweiss.com; Istel, Sarah; sgeorge@seegerweiss.com; Tarlowe, Richard
Cc: Roma Petkauskas; David Smith; jaw@garretsongroup.com; jbruemmer@garretsongroup.com; jpaschal@garretsongroup.com; mlg@garretsongroup.com; mfrancis@garretsongroup.com
Subject: Medical Journal Article about the Program

We use Google alerts to monitor mentions of the NFL Settlement Program. We noticed a recent article titled "For Your Patients-Concussion: Why Some Neurologists Are Calling 'Foul' Over Criteria for NFL Concussion Settlement," posted on 10/4/18 in *Neurology Today*, an online publication. Here is a link to it: https://journals.lww.com/neurotodayonline/pages/articleviewer.aspx?year=2018&issue=10040&article=00001&type=Fulltext

The article has statements critical of the Settlement Program, particularly by Dr. Randolph Evans [redacted]

You likely are familiar with [redacted] Dr. Evans [redacted]

(1) Dr. Evans served as a Qualified MAF Physician from May 2017 until we terminated his status on 5/28/18 because we of his questionable methodologies, disregard of Program rules and refusals to cooperate or even discuss things with us. Among other things, he had done a study published in *Neurology Today* and had not been forthcoming with us about its purpose and scope. We have 110 Monetary Award claims relying on his diagnoses, many of which are in Audit or are on appeal.

[redacted]

[redacted]

[redacted]

[redacted]

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EXHIBIT 4

Subject Initials _____

CLINICAL DEMENTIA RATING (CDR)

CLINICAL DEMENTIA RATING (CDR):	0	0.5	1	2	3

	Impairment				
	None 0	Questionable 0.5	Mild 1	Moderate 2	Severe 3
Memory	No memory loss or slight inconsistent forgetfulness	Consistent slight forgetfulness; partial recollection of events; "benign" forgetfulness	Moderate memory loss; more marked for recent events; defect interferes with everyday activities	Severe memory loss; only highly learned material retained; new material rapidly lost	Severe memory loss; only fragments remain
Orientation	Fully oriented	Fully oriented except for slight difficulty with time relationships	Moderate difficulty with time relationships; oriented for place at examination; may have geographic disorientation elsewhere	Severe difficulty with time relationships; usually disoriented to time, often to place	Oriented to person only
Judgment & Problem Solving	Solves everyday problems & handles business & financial affairs well; judgment good in relation to past performance	Slight impairment in solving problems, similarities, and differences	Moderate difficulty in handling problems, similarities, and differences; social judgment usually maintained	Severely impaired in handling problems, similarities, and differences; social judgment usually impaired	Unable to make judgments or solve problems
Community Affairs	Independent function at usual level in job, shopping, volunteer and social groups	Slight impairment in these activities	Unable to function independently at these activities although may still be engaged in some; appears normal to casual inspection	No pretense of independent function outside home Appears well enough to be taken to functions outside a family home	Appears too ill to be taken to functions outside a family home
Home and Hobbies	Life at home, hobbies, and intellectual interests well maintained	Life at home, hobbies, and intellectual interests slightly impaired	Mild but definite impairment of function at home; more difficult chores abandoned; more complicated hobbies and interests abandoned	Only simple chores preserved; very restricted interests, poorly maintained	No significant function in home
Personal Care	Fully capable of self-care		Needs prompting	Requires assistance in dressing, hygiene, keeping of personal effects	Requires much help with personal care; frequent incontinence

Score only as decline from previous usual level due to cognitive loss, not impairment due to other factors.

EXHIBIT 5

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June 28, 2018

By Email (via Orran L. Brown, Sr., Esq.)

Special Master Wendell Pritchett, Esq.
Office of the Provost
University of Pennsylvania
3501 Sansom Street
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Dear Special Master Pritchett:

The NFL Parties respectfully submit this letter to address the critical importance of enlisting the assistance of Appeals Advisory Panel members (the "AAPs") and Appeals Advisory Panel Consultants (the "AAPCs") when deciding claim appeals that turn on technical, medical grounds.

The appeals process is, of course, not intended to second-guess medical determinations made by qualified physicians; the appeals process is, however, intended to correct errors in diagnoses supported by clear and convincing evidence, and, as recent appeal determinations demonstrate, it is simply not possible to make that assessment without the assistance of medical experts. Indeed, that was a critical reason for establishing the Appeals Advisory Panel and Appeals Advisory Panel Consultants in the first place. The intent of the Settlement Agreement was that the Court (or the Special Master when

designated for appeals) would consult with AAPs and AAPCs on medical issues when reviewing claim appeal determinations.

Based on our review of recent Post-Appeal Notices of Monetary Award Claim Determination, we understand that these expert resources have not consistently been used on appeals turning on medical issues, and as described below, prior guidance provided by AAPs and AAPCs demonstrate that at least certain of those appeals were incorrectly decided as a result. Where AAPs or AAPCs were not consulted and the claim has not yet been paid, the NFL Parties respectfully request that you stay payment and re-review those appeals with AAP/AAPC consultation to confirm that the Monetary Awards are being paid to Settlement Class Members whose claims are supported by the diagnostic criteria required under the terms of the Settlement Agreement.

* * * *

The Parties to the Settlement Agreement made the AAPs and AAPCs a central part of the claim evaluation and appeal process precisely because they recognized that the Court or its designees (here, the Special Masters) would not be medical experts and would not have the medical training to evaluate medical records and other technical medical issues. The AAP and AAPC positions therefore were created to advise the Court (and, by extension, the Special Masters) on issues requiring inherently technical medical expertise—as in any case where the Court retains experts to advise on technical issues. As the name of the Appeals Advisory Panel suggests, the goal in providing for such assistance was to ensure that appeals are correctly decided as a matter of medicine and to ensure that the Court and Special Masters are not put in the position of having to evaluate diagnoses made by medical professionals without the benefit of proper medical expertise.

To that end, the AAPs are highly-skilled neurologists who are uniquely qualified to evaluate the medical records and other materials submitted in Claim Packages and determine whether a claimant's Qualifying Diagnosis was properly rendered. Similarly, the AAPCs are expert neuropsychologists in the field who, like the AAPs, have unique expertise in and training for evaluating the neuropsychological testing submitted in the Claim Packages that may be relevant to the consideration of the claim appeals. Notwithstanding the central role that the AAPs and AAPCs were designed to play in the appeals process, the NFL Parties understand that AAPs and AAPCs may not have been consulted in connection with several recent appeals turning on critically important medical issues—and in particular, claims relying on diagnoses by Qualified MAF Physicians where the medical records have not previously been reviewed by *any* AAP member.

Despite the fact that Qualified MAF Physicians are approved by the Parties, including the NFL Parties, it nevertheless was always the intent of the Parties that AAPs and AAPCs would be used on appeals involving Qualified MAF Physicians. The Parties did not personally interview these physicians or train them on all aspects of the Settlement program; instead, the Claims Administrator has provided them a manual and periodic alerts on various topics. In fact, and by way of example, the Claims Administrator has informed

the Parties on weekly calls that AAP members who have reviewed the work of certain Qualified MAF Physicians in connection with audits have flagged that they do not believe that certain of these approved providers have an appropriate understanding of the National Alzheimer's Coordinating Center's Clinical Dementia Rating ("CDR") scale used to measure functional impairment. As such, even where an audit did not find sufficient evidence of a material misrepresentation, omission or concealment, that result did not mean that the AAP member who assisted BrownGreer in reviewing diagnoses rendered by Qualified MAF Physicians felt that the diagnoses were medically appropriate and consistent with the terms of the Settlement Agreement. In fact, BrownGreer has specifically suggested to the contrary. As a procedural matter, however, the NFL Parties were required to use the appeals process afforded under the terms of the Settlement Agreement to raise these medical issues for review. To the extent that the Court or Special Master does not use the AAP or AAPC resource in connection with appeals turning on medical issues, however, the ultimate appeal determination of whether there is clear and convincing evidence that the diagnosis was in error is rendered without the benefit of the AAP and AAPC medical expertise on the fundamental issues.

Recent appeal determinations that we believe to have been issued without AAP/AAPC consultation illustrate these concerns when comparing the underlying appeal arguments to Notices of Denial of Monetary Award Claim that reflect the medical expert views of the AAP/AAPC on the diagnostic criteria for Level 1.5 and 2 Neurocognitive Impairment claims.

For example, recent appeal determinations apparently made without AAP consultation rejected the NFL Parties' arguments that a Qualified MAF Physician's Level 2 diagnoses were deficient because the claimants did not establish or corroborate the requisite level of functional impairment to merit a CDR score of 2, including where the claimants continued to drive and coach sports. These determinations are not consistent with prior AAP determinations. Rather, AAP members have denied dozens of dementia claims based on the same arguments made by the NFL Parties in those appeals, including that "the description of daily functional abilities such as the ability to drive independently and perform volunteer duties for church . . . would not be generally consistent with a CDR score of 2.0 in the area of Community Affairs, which requires 'no pretense of independent function,'" and "*[c]onsequently the Qualifying Diagnosis of Level 2 Neurocognitive Impairment is not made in a manner generally consistent with the settlement criteria for that diagnosis.*" (*See* Doc. No. 159462, SPID 260000283 (emphasis added); *see also* Doc. No. 172128, SPID 100004976 ("The Qualifying Diagnosis of Level 2 Neurocognitive Impairment was not made in a manner that is generally consistent with the settlement criteria," including where "volunteering as a *coach for a High School football team*, and *continuing to drive* are not generally consistent with a CDR rating of 2 for the area of Community Affairs") (emphasis added); Doc. No. 172329, SPID 100003630 ("stating that a player who "manages his finances, lives alone, drives, and has a 'rental business'" presents with a history "not generally consistent with CDR scores of 2" and the Level 2 diagnosis "was not made in a manner that is generally consistent with the settlement criteria").)

Moreover, the NFL Parties have argued on appeal that normal or moderately impaired performance on cognitive screening tests such as the MMSE or MOCA, combined with functionality conflicting with the assigned CDR score, provides clear and convincing evidence that the diagnosis was not supported. Although appeals brought on those grounds have been denied (apparently without the assistance of an AAP or AAPC), the NFL Parties' position is supported by numerous prior determinations of AAPs. Indeed, AAP members regularly have expressed that same opinion in recent claim denials. (*See* Doc. No. 166326, SPID 100001522 ("The bulk of the history and data, along with achievement of a 30/30 MMSE score, appear inconsistent with a diagnosis of Level 1.5 Neurocognitive Impairment"); Doc. No. 173271, SPID 100009853 ("Specifically, the score of 25/30 on the MOCA test is not generally consistent with a moderate to severe cognitive decline and the ability to continue to drive, cook, play golf (except due to back pain) . . . are not generally consistent with either the presence of dementia or CDR ratings of 1").)

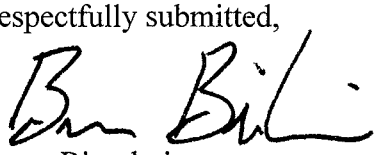
Similarly, the NFL Parties have recently appealed a number of claim determinations on the basis that they were not generally consistent with the Injury Definitions for Level 1.5 or 2 as set forth in the Settlement Agreement for the BAP where the diagnosing physician deviated from applying the BAP diagnostic criteria with regard to the required cognitive domains and the extent of impairment necessary to establish a diagnosis—despite the fact that performance on the claimant's same tests in the BAP conclusively would not permit a Qualifying Diagnosis. AAP members, in consultation with AAPCs, have demonstrated their expertise in analyzing the medical records for similar issues on pre-Effective Date claims. (*See, e.g.*, Doc. No. 172737, SPID 100000393 ("[T]he test battery is not generally consistent with the settlement criteria because multiple variables were derived from the same tests, which inflates the probability of observing a few low scores. When the settlement criteria for impairment in a person of presumed average premorbid ability are applied to the test measures, the Retired NFL Football Player does not meet settlement criteria in any domain").)

Finally, the NFL Parties recently appealed a Qualified MAF Physician's Level 1.5 diagnosis on the basis that the claimant failed five of seven performance validity metrics in a manner that demonstrated malingering according to leading literature. This type of appeal calls for the expertise of the AAPCs, who have analyzed similar situations in several claim denials to date. (*See, e.g.*, Doc. No. 167687, SPID 100002662 ("Additionally the neuropsychological testing performed . . . does not support a Level 1.5 Neurocognitive Impairment diagnosis due to . . . detection of sub-optimal effort or malingering on multiple performance validity tests"); Doc. No. 166325, SPID 100001479 ("The neuropsychological testing findings . . . are not valid because of extremely low scores on two validity measures suggesting suboptimal effort and invalid performance, and insufficient explanation provided for discrepancies and inconsistencies in the test scores. . . . [c]onsequently, the testing does not support the Qualifying Diagnosis of Level 1.5 Neurocognitive Impairment, which was not made in a manner generally consistent with the diagnostic criteria specified in the settlement").)

These examples illustrate the critical importance of AAP and AAPC review of medical records when an appeal turns on medical arguments that only highly-trained doctors and neuropsychologists can properly interpret. The expectation was that the Court (or the Special Master) would exercise its discretion to use this resource when appeals involve technical medical issues outside the Court's or Special Master's expertise.

For these reasons, the NFL Parties respectfully request a re-review of recent appeals that have not yet been paid turning on medical issues for which an AAP member was not consulted, with an accompanying stay of payment until that review is complete. The NFL Parties believe that such consultation is necessary to ensure that the medical integrity of the Settlement Program is preserved and that all claims are correctly decided. We further respectfully request that the Special Masters seek the advice of AAPs and AAPCs going forward where an appeal raises technical medical issues.

Respectfully submitted,



Bruce Birenboim

cc: The Honorable Anita B. Brody
Special Master Jo-Ann Verrier, Esq.
Chris Seeger, Esq.
Brad S. Karp, Esq.

EXHIBIT 6

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July 11, 2018

By Email (via Orran L. Brown, Sr., Esq.)

Special Master Wendell Pritchett, Esq.
Office of the Provost
University of Pennsylvania
3501 Sansom Street
Philadelphia, PA 19104

Special Master Use of the Appeals Advisory Panel on Claim Appeals

Dear Special Master Pritchett:

The NFL Parties respectfully submit this letter to respond to certain erroneous contentions in Co-Lead Class Counsel's July 6, 2018 letter responding to our June 28, 2018 letter concerning the above-referenced issue.

Critically, Co-Lead Class Counsel does not, and cannot, contest that recent appeal determinations (apparently made without AAP consultation on technical medical issues) reflected findings squarely at odds with prior AAP determinations on those same medical issues—demonstrating precisely why expert consultation is important. Instead, Co-Lead Class Counsel argues—in blatant bad faith and in conflict with their many prior statements on the matter and the Settlement Agreement to which they agreed—that the NFL Parties lack an appeal right of diagnoses made by Qualified MAF Physicians and

Qualified BAP Providers, and that the role of the Appeals Advisory Panel members ("AAPs") and the Appeals Advisory Panel Consultants ("AAPCs") is limited to reviewing pre-Effective Date claims. Neither argument is correct.

First, Co-Lead Class Counsel's position that the NFL Parties do not have the right to appeal a claim determination based on a diagnosis made by a Qualified MAF Provider or Qualified BAP Providers has no support in the Settlement Agreement. (*See* Seeger Letter at 3.) Section 9.5 of the Settlement Agreement, which sets forth the scope of appeals, describes two distinct areas of appeal: (i) "The Claims Administrator's determination as to whether a Settlement Class Member is entitled to a Monetary Award"; and (ii) "the calculation of the Monetary Award." Co-Lead Class Counsel's argument that the reference to "the Claims Administrator's determination" in that provision somehow strips the NFL Parties of their appeal regarding the diagnosis is wrong.

The Claims Administrator—not the underlying physician—is always the entity that issues the determination, regardless of when the diagnosis occurs or who makes the diagnosis.[1] Contrary to Co-Lead Class Counsel's suggestion, however, the Claims Administrator never makes a diagnosis; there is always an underlying physician who makes the diagnosis, whether it is a Qualified MAF Physician, Qualified BAP Providers, or a pre-Effective Date physician. The clear intent for the scope of appeal, as the words of Section 9.5 state, was the substantive issue of "whether a Settlement Class Member is entitled to a Monetary Award"—in other words, does he have the claimed diagnosis or not? There is no other issue to which these words reasonably could be construed to refer. This view is bolstered by the fact that subsection (ii)'s reference to the "calculation of the Monetary Award" refers to the Claims Administrator's more mechanical determination with regard to offsets and age at the time of diagnosis. As such, the only appeal even possibly contemplated by subsection (i)'s reference to "whether a Settlement Class Member is entitled to a Monetary Award" is if the diagnostic criteria set forth in the Settlement Agreement have been met. Otherwise, the two subsections would refer to the same thing—the mechanical check on the calculation of the award based on years played, history of Stroke or TBI, and age—and would be completely redundant of each other, a view that is flatly contrary to traditional rules of statutory construction which require that each provision be given a separate and independent meaning.

If there were any doubt on this issue, Co-Lead Class Counsel's submission to Court in seeking approval of the Settlement Agreement proves the distinction between these two areas of appeal. There, Co-Lead Class Counsel conceded that "the NFL Parties have a right to appeal either a determination of whether a Settlement Class Member is entitled to a Monetary Award or Derivative Claimant Award, or the amount of the Award."

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[1] In fact, the Claims Administrator does not conduct a substantive review of MAF and BAP diagnoses when issuing claim determinations in part because the Settlement Program was designed to permit the NFL Parties to review those diagnoses in consultation with medical experts and appeal those diagnoses that reflect errors.

(*See* Mem. of Law in Support of Class Pls.' Mot. for an Order Granting Final Approval of the Settlement and Certification of Class and Subclass 26, ECF No. 6423-1; *see also* Rule 7 of Rules Governing Appeals of Claim Determinations ("[T]he NFL Parties may appeal determinations by the Claims Administrator as to: (1) whether the Retired NFL Football Player (or Representative Claimant) is entitled to a Monetary Award; (2) how the Claims Administrator calculated the Monetary Award; and (3) whether the Claim Package is valid without medical records under Section 8.2(ii) of the Settlement Agreement.").)

Co-Lead Class Counsel's claim that diagnoses made by Qualified MAF Providers or Qualified BAP Providers are somehow immune to review on appeal because the physicians were approved by the Parties is a *non sequitur*, particularly where, as here, the NFL Parties have committed to uncapped liability based on diagnoses rendered by these physicians over the next 65 years. The fact that the Parties approved the Qualified MAF Physicians and Qualified BAP Providers based on limited diligence does not make them infallible. This is precisely why the Parties created the AAPs and AAPCs, who are highly-credentialed neurologists and neuropsychologists at the top of their fields, stringently vetted by the Parties for the very purpose of reviewing diagnoses made in the Settlement Program. And, indeed, as the NFL Parties' June 28, 2018 letter noted, the Claims Administrator has received feedback from the AAPs and AAPCs in connection with audits that certain MAF and BAP physicians have committed material errors[2] (despite, in certain instances, finding no evidence of potential fraud), and the Claims Administrator

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[2] For example, BrownGreer terminated Qualified MAF Physician Dr. Jason Muir on July 9, 2018. In notifying the Parties of that termination, BrownGreer noted that Dr. Muir diagnosed a retired player with Level 2 Neurocognitive Impairment despite employment not compatible with that diagnosis and Dr. Muir disregarding neuropsychological testing results in which the retired player "failed validity measures so badly that the neuropsychologist found that he did not meet the criteria for neurocognitive impairment." (July 9, 2018 email from Morgan Meador to the Parties.) In a related audit of the retired player's lawyer, an AAPC agreed with the findings of performance invalidity and an AAP found it unusual for Dr. Muir to disregard such test results. Had it not been for the related audit, this claim would have been approved as a Qualified MAF Physician diagnosis, and the NFL Parties would have been required to appeal on the basis that the diagnosis was rendered in error.

Co-Lead Class Counsel also seeks to mislead by arguing that the NFL's appeal rate of Level 1.5 and 2 claims involving diagnoses rendered by Qualified MAF Physicians evidences that the NFL "is at odds with the medical establishment." (Seeger Letter at 3.) Not so. Co-Lead Class Counsel knows full well—as do the Special Masters—that the vast majority of those appeals involve a single Qualified MAF Physician, Dr. Randolph Evans, who has since been terminated from his role by BrownGreer and provided a grossly disproportionate share of the total dementia diagnoses by Qualified MAF Physicians, and/or a neuropsychological practice group in Texas that administered the BAP testing regime to claimants but altered its diagnostic criteria to allow diagnoses that would be impermissible in the BAP. The Settlement Program's short history demonstrates that Qualified MAF Physicians are not unerring, and the NFL Parties' appeal right is a necessary check on the payment of otherwise invalid claims.

determined that the proper procedure for raising those errors was through the NFL Parties' appeal right.

Second, Co-Lead Class Counsel misleadingly minimizes the agreed-upon role of AAPs and AAPCs by citing their responsibilities to review pre-Effective Date claims and certain disagreements between Qualified BAP Providers as to an appropriate diagnosis, if any. (Seeger Letter at 2.) But the fact that the AAPs and AAPCs have these roles does not mean that they do not also have a key role in appeals of post-Effective Date claim determinations from Qualified MAF Physicians and Qualified BAP Providers. This is demonstrated by examining the "legislative history" of this provision. Co-Lead Class Counsel fails to mention the uncontestable fact that the Parties agreed to the creation of the aptly named *Appeals* Advisory Panel in the initial proposed settlement agreement—*at which time there was no mandatory pre-Effective Date AAP claim review*. Pre-Effective Date review was added to the revised settlement agreement as a fraud protection when the Parties uncapped the NFL Parties' liability. This new responsibility supplemented the role of the AAP to bolster overall protections; the Parties never agreed to eliminate other intended roles. Now, as it was then, the primary and originally intended purpose of the Panel was, as its name demonstrates, to assist on claim appeals over the 65-year term of the Settlement Agreement. As such, the intent was always for the AAPs and AAPCs to advise the Court on inherently technical medical issues that inevitably would arise on appeals and elsewhere. The language of Section 9.5 is fully consistent with this view.

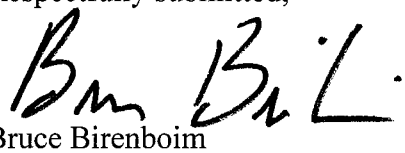
Co-Lead Class Counsel is also wrong that the NFL Parties' position is that it is "compulsory" and "mandatory" to involve the AAPs and AAPCs on every appeal. (Seeger Letter at 1-2.) That is not the NFL Parties' view. There may well be appeals where the record is clear in favor of appellant or appellee and the Special Master or Court need not seek consultation. But where the appeal involves technical medical issues—as recent appeals have done in a manner that goes to the heart of the diagnostic criteria of the Settlement Agreement—the plain language of the Settlement Agreement, and the Parties' plain intent was for the fact finder to use the neutral expert AAPs and AAPCs jointly recommended by the Parties and appointed "to advise the Court or the Special Master with respect to medical aspects of the Class Action Settlement." (Settlement Agreement, § 2.1(g); *see also* § 9.8.)

In sum, the NFL Parties' goal here is simple: to pay Monetary Awards to Settlement Class Members *who meet the diagnostic criteria for the Qualifying Diagnoses*. As the Court is well aware, that is the balance the Parties agreed to and the deal the Parties made, and that means that not every retired player with cognitive or neurological issues is entitled to a Monetary Award. To ensure this carefully calibrated and negotiated result, it is of critical importance that the Court and Special Masters use the AAP and AAPC resource on appeals involving technical medical issues outside of the Court's or Special Master's expertise, as the Claims Administrator has done in connection with audits.

For these reasons, the NFL Parties respectfully request a re-review of recent appeals that turned on medical issues for which an AAP member was not consulted, with

an accompanying stay of payment until that review is complete. We further respectfully again request that the Special Masters seek the advice of AAPs and AAPCs moving forward where an appeal raises technical medical issues.

Respectfully submitted,



Bruce Birenboim

cc: The Honorable Anita B. Brody
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EXHIBIT 7

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August 28, 2018

By Email (via Orran L. Brown, Sr., Esq.)

Special Master Wendell Pritchett, Esq.
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[redacted]

Special Master Use of the Appeals Advisory Panel on Claim Appeals

Dear Special Master Pritchett:

[redacted]

The NFL Parties' appeals of recent claims largely concern diagnostic mistakes made by Qualified MAF Physicians with regard to Level 1.5 and 2 Neurocognitive Impairment. These appeals raise precisely the same mistakes previously found by the AAP in connection with their review of other claimed diagnoses. In fact, the neutral AAP have notified the Claims Administrator on numerous occasions that certain Qualified MAF Physicians – including the very doctors whose diagnoses are the subject of

the NFL Parties' recent appeals – are rendering diagnoses in the Settlement Program that are not consistent with the Qualifying Diagnoses alleged. For example, when the Claims Administrator concluded an audit investigation into Dr. Nicholas Suite, the Claims Administrator informed the Parties that an AAP member reviewed six claims supported by Dr. Suite and, while finding a lack of evidence to support a finding of fraud, the AAP member concluded that "the CDR scores [Dr. Suite] assigned did not always match the player's reported functional abilities." Based on this feedback from the AAP member, the Claims Administrator wrote the Parties that it was "concerned about those potential flaws in Dr. Suite's MAF diagnoses," but that the concerns were "ones of clinical judgment and compliance with medical and Settlement Agreement diagnostic criteria . . . to be dealt with in the claims process." In other words, the Claims Administrator stated that the appeals process was the proper vehicle to rectify these diagnostic errors observed by the AAP. Accordingly, the NFL Parties recently appealed two claims based on Dr. Suite's diagnoses (SPID 100002712 and 100016955)—including on the very issue of his assignment of CDR scores that did not match the player's reported functional impairment. Upon information and belief, however, the AAP were not consulted on the medical issues raised by the appeals, and those claims are now due to be paid absent the reconsideration previously requested by the NFL Parties.

These are not isolated issues. On June 29, 2018, the Claims Administrator copied the Special Masters on a memorandum concluding an audit without referral into two other Qualified MAF Physicians, Dr. Bruce Rubin and Dr. Kester Nedd. Again, the Claims Administrator sent four claims supported by these Qualified MAF Physicians (two by each physician) to an AAP member for review. According to BrownGreer, the AAP member concluded "that in three of the claims, the players likely misrepresented their cognitive impairments and the AAP member would deny the claims," and on the fourth claim the AAP would downgrade the diagnosis from Level 2 to Level 1.5. In addition, the AAP member found that Drs. Rubin and Nedd "did not adequately apply CDR methods or scoring algorithms to properly assign Injury Definition diagnoses," were "overly reliant on self-report," and "did not document critical evaluation of the validity or accuracy of neuropsychological reporting of cognition and function." Again, however, in the absence of any finding of fraud, the Claims Administrator let the claims proceed so that these diagnostic issues could be addressed on appeal. The NFL Parties recently appealed five claims involving diagnoses by Drs. Rubin and Nedd, and four of those appeals have recently been denied without apparent AAP consultation.

In addition, based on audit diligence work performed in consultation with AAP members, the Claims Administrator informed the Parties on several occasions that it had significant concern that Dr. Randolph Evans (now terminated from the Program) had been regularly misapplying the CDR in a manner that allowed him to render Qualifying Diagnoses that otherwise would not be supported. As of August 27, 2018, Dr. Evans was singularly responsible for 34% of all Qualifying Diagnoses rendered by the 144 Qualified MAF Physicians. Many of the NFL Parties' recent appeals concern diagnoses made by Dr. Evans, and, upon information and belief, the AAP has not been consulted on any of those appeals to date—including the claim of SPID 100002497 for whom Dr. Evans

assigned a CDR score of 2 in Community Affairs despite Claimant "deny[ing] any difficulty with driving," serving as CEO of an athletic training company that employs twelve staff members, and reporting that "[i]n terms of community affairs . . . [Claimant] has no areas of concern regarding his adaptability." Moreover, Claimant continues to ski, cook, and host golf tournaments and NFL viewing parties for fans. Claimant is now scheduled to receive over $3 million for purported moderate dementia at age 41 despite continued activities that are wholly inconsistent with the Qualifying Diagnosis. The NFL Parties respectfully submit that such result is squarely inconsistent with the consistent medical expertise provided by the AAP.

These examples illustrate the critical importance of AAP review of medical records when an appeal turns on technical medical arguments. For these reasons, the NFL Parties reiterate the importance of seeking consultation on claim appeals involving technical medical issues, regardless of whether the Qualifying Diagnoses were rendered before or after the Settlement Program became effective. Such consultation is necessary to ensure that the medical integrity of the Settlement Program is preserved and that all claims are correctly decided.

Respectfully submitted,

Bruce Birenboim (BB)

Bruce Birenboim

cc: Brad S. Karp, Esq.
Chris Seeger, Esq.
Special Master Jo-Ann Verrier, Esq. (via Orran L. Brown, Sr., Esq.)